Supreme Court U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

FRED VAN DYKEN,

Petitioner,

v.

RICK DAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At his second trial, Petitioner Van Dyken was convicted of deliberate homicide by virtue of a jury instruction which misdescribed the intent element of the offense – the only element contested at trial. Van Dyken's first trial jury, correctly instructed, had been unable to agree on a verdict.

On habeas review, the U.S. District Court found the defective instruction to be harmless constitutional error; it concluded the jury, if correctly instructed, would have convicted Van Dyken.

On appeal, Van Dyken contended the District Court misapplied the *Brecht* standard for assessing harmless error. He also argued that, even in light of *California v. Roy*, the methodology described by Justice Scalia in his *Carella* and *Roy* concurrences must be used to assess instructional error this distorting and fundamental.

The Ninth Circuit affirmed the denial of relief.

The questions presented are:

1. Does *In re Winship* require that the methodology set out in Justice Scalia's *Roy* concurrence be used for assessing the harmlessness of instructional errors which misdescribe the element of the offense at issue at trial?

2. In assessing the harmlessness of an erroneous elements instruction, should federal habeas courts speculate how a correctly instructed jury would have decided the case, or should they look to the role played by the actual instruction in the historical trial to determine whether it had "injurious influence" or not?

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CONSTITUTIONAL PROVISIONS

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PETITION FOR WRIT OF CERTIORARI

Fred Van Dyken respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding November 16, 1998, in order to clarify this Court's opinion and concurring opinion in *California v. Roy*, 519 U.S. 2 (1996), concerning the important federal question unsettled there and raised once more here.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is unpublished. It is reprinted as Appendix A hereto, at App. 1.

JURISDICTION

The judgment of the United States Court of Appeals was entered November 16, 1998. This petition is filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

• The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No state . . . shall deprive any person of life, liberty, or property without due process of law . . .

• The Sixth Amendment to the United States Constitution which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury of the state . . .

STATEMENT OF THE CASE

Fred Van Dyken, a prisoner in state custody, filed a petition for a writ of habeas corpus in the United States District Court for the District of Montana, pursuant to 28 U.S.C. Section 2254(a).

Van Dyken, serving a term of life imprisonment without possibility of parole under a 1987 state court judgment, contended that the jury instructions given at his second trial[1] for deliberate homicide misdefined the crime, thus violating his due process right not to suffer conviction except upon proof beyond a reasonable doubt of every element of the crime charged. The instructional error concerned the so-called "mental" element of the offense – the critical question whether he meant to kill or not – the only element of the offense that had been contested at either trial.

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[1] Van Dyken's first trial ended with a hung jury, with the jurors variously voting for verdicts of deliberate, mitigated, and negligent homicide – in other words, with the jurors in doubt as to intent.

The U.S. District Court found that the jury instructions given at Van Dyken's second trial did indeed misdefine the mental element of the offense, in that

> "The jury instruction actually given required only that the jury find that the petitioner intended to commit the act, without regard to what result he might have intended . . . The erroneous jury instruction as to the mental state of deliberate homicide gathers into its reach merely negligent conduct . . . "

The District Court based this analysis upon a review of recent Montana Supreme Court decisions concerning "what jury instructions are sufficient to impart the meaning of the 'purposely or knowingly' mental state . . . " [*See*, Opinion and Order dated March 11, 1997, reprinted in its entirety as Appendix B herein].

The District Court concluded the instructional error was of constitutional dimension, citing *In re Winship*, 397 U.S. 358 (1970) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Court then went on to conclude, however, that the error was harmless, and denied relief. This was the first finding of harmless error that had ever been made in the case.[2]

On appeal to the Ninth Circuit, Van Dyken first argued that the instructional error could not be harmless

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[2] Although the core elements instructions defining – or misdefining – intent had been a central contested issue since before his first trial, the erroneous instructions upon which Van Dyken was convicted at his second trial had not been definitively determined to be unconstitutional until after his habeas petition was filed.

even under the most lenient harmless error standard applicable. This was because it concerned a legal issue that had been central to the case since its inception; because it involved the very instruction designed to guide the jury in resolving the only contested factual issues in the trial; and because the State had specifically relied on the erroneous instruction in its summation to the jury. Van Dyken also argued that the instruction was demonstrably not harmless since the first trial jury, correctly instructed, had failed to return a guilty verdict.

Second, Van Dyken argued that even after this Court's decision in *California v. Roy*, 519 U.S. 2 (1996), it remained an open question whether a different form of harmless-error analysis was necessary in cases of instructions which misdescribed the contested elements of the offense, since such instructions effectively led to verdicts for different crimes than the ones charged. Citing Justice Scalia's and Ginsburg's concurrence to this effect in *Roy*, 519 U.S. at 6-8, Van Dyken asked the Ninth Circuit to assess whether the second trial jury ever rendered a verdict on the charged offense, not whether it would have rendered a guilty verdict, properly instructed [*See Appellant's Brief, Van Dyken v. Day*, Ninth Circuit No. 97-35550, pages 51-54, reprinted as Appendix C herein].

Without specifically addressing Van Dyken's critical second contention, the Ninth Circuit affirmed the District Court's finding of harmless error, stating it was sure "that the jury, if properly instructed, would have found that he acted 'purposely' . . . " [Opinion, p. 5, Appendix A, App. 5].

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *CALIFORNIA V. ROY* REQUIRES FURTHER CLARIFICATION IN LIGHT OF SIGNIFICANT AND TROUBLING UNCERTAINTIES REGARDING ITS PROPER APPLICATION IN HABEAS CASES.

Although it was meant to clarify harmless error analysis in the habeas context, this Court's opinion in *California v. Roy*, 519 U.S. 2 (1996) did not entirely do so. This is because the *per curiam* opinion, read together with the concurrence, still leaves it an open question how jury instructions which seriously misdescribe the essential elements of a state offense should be analyzed for harmlessness in a federal habeas context. *Peck v. U.S.*, 102 F.3d 1319, 1320-27 (2nd Cir. 1996) (C.J. Newman, concurring). As several Circuit opinions have pointed out, one could adhere fully to the lenient *Brecht/Kotteakos* standard of proof in assessing harmlessness, while still utilizing Justice Scalia's recommended methodology to determine "what *constitutes* the harmlessness to which this more deferential standard is applied," *Roy*, 519 U.S. at 6 (Scalia, concurring); *see, e.g., Peck, id.; Roy v. Gomez*, 108 F.3d 242, 243-246 (9th Cir. 1997) (C.J. Hug, dissenting); *Smith v. Horn*, 120 F.3d 400, 418-419 (3rd Cir. 1997) [applying the *Brecht* standard of proof *and* the Scalia methodology to reach the conclusion that misdescription error in state jury instruction was *not* harmless]; *Waldemer v. U.S.*, 106 F.3d 729, 736, fn.3 (7th Cir. 1996) [distinguishing between *Brecht* "standard for reviewing harmless error" and Scalia method describing "the very narrow occasion when a court's failure to submit an essential element of a criminal offense to a jury could be considered harmless"].

This uncertainty in the wake of *Roy* is magnified, as several circuit jurists have noted,[3] by the fact that the Scalia methodology appears to represent a much sounder approach to the problem of flawed elements instructions than lumping them indiscriminately together with all other "trial errors." This is because a jury instruction which seriously misdescribes an essential element of the offense has a natural and strong tendency to lead to a verdict of guilty of a different crime than the one for which the defendant was on trial. This tendency, if realized, in turn leads inevitably to the conclusion that a defendant in such a trial was denied the fundamental right to a jury verdict beyond a reasonable doubt on the offense of conviction, *Roy*, 519 U.S. at 7 (Scalia, concurring). This is much more like a structural than a trial error; it is more like the error described in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), which leaves no object upon which harmless error analysis can operate, than it is an error in the presentation of evidence. Only the supplemental harmless-error methodology outlined by Justice Scalia by way of concurrence, first in *Carella v. California*, 491 U.S. 263, 269-272 (1989), then in *Roy*, *id.*, takes account of this fact and leads to a reliable solution.

If in fact uncertainty remains as to how to determine harmless error accurately with respect to flawed elements instructions, then the possibility of gross injustice remains until the uncertainty is resolved. The present case well illustrates this possibility of injustice. Although Van Dyken argued strenuously over a period of more

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[3] *E.g.*, Chief Judge Newman, 102 F.3d at 1320-27; Chief Judge Hug, 108 F.3d at 243-246.

than four years – spanning two trials and an appeal – for an instruction faithful to the law that would focus the jury's deliberation on the critical factual issue in the case (his intent), he was ultimately convicted with an instruction that permitted the jury to return a guilty verdict without a finding of the requisite intent. Though reviewing federal judges in his habeas case accepted the State's view that the evidence against him was "overwhelming," this is a poor substitute for a verdict by twelve jurors – especially since in Van Dyken's first trial, twelve jurors, operating with an accurate elements instruction and the same "overwhelming" evidence, failed to find him guilty of the same offense.

Justice Scalia's methodology works. It leaves flawed elements instructions in the category of "trial errors" – that is, subject to harmless error analysis – while recognizing their special character as organizing and logically channeling all the jury's factual findings in the case. It recognizes that such instructions introduce a kind of error that is not really capable of being quantitatively weighed against other discrete items of evidence from the trial. Scalia is surely right that an instruction misdescribing an essential element of an offense effectively withdraws that element from the jury's consideration. It follows, as he says, that such an error "can be harmless only if the jury verdict on other points effectively embraces this one, or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well," *Roy*, 519 U.S. at 7 (Scalia, concurring). As he also says, *Brecht* simply mandates that a reviewing court, in a habeas proceeding, determine whether there is "grave doubt" that this is so; it should

not authorize it to canvass all the evidence presented in the trial to determine whether a reasonable jury would have found the absent element, had it been correctly presented – when it never was.

II. THE *ROY* DECISION HAS UNEXPECTEDLY CREATED A CONFUSING TWO-TIER "DOUBLE STANDARD" IN HARMLESS ERROR JURISPRUDENCE AS BETWEEN COLLATERAL REVIEW AND DIRECT APPEAL.

Not only has *California v. Roy* failed to create a clear and sensible rule for handling core instructional errors, it has also led to a confusing *second* "double standard" for assessing harmless error in habeas cases as opposed to direct appeals. This is because, on direct appeals, federal courts are specifically utilizing the Scalia methodology to assess whether a jury instruction misdescribing an element of the offense can be considered harmless, *see, e.g., U.S. v. Miller*, 111 F.3d 747, 752-753 (10th Cir. 1997) [explicitly using the Scalia methodology to conclude a flawed elements instruction was not harmless error]; *U.S. v. Durham*, 139 F.3d 1325, 1335 (10th Cir. 1998) [explicitly utilizing the Scalia methodology to conclude a flawed elements instruction was harmless, because "the jury verdict on other points effectively embraced" the misdescribed element]; whereas, in habeas cases, they for the most part are not, *see, e.g., Peck v. U.S.*, 106 F.3d 450, 456 (2nd Cir. 1997); *Harris v. Warden*, 152 F.3d 430, 436-37 (5th Cir. 1998) [characterizing *Roy* and other jury-instruction cases as "particularly puzzling," but not using the Scalia methodology on habeas review].

This, then, has created a twofold discrimination in the way habeas cases involving questions of harmless error are handled, in contrast to direct appeals. First – as this Court intended – the standard of proof used is different: on direct appeals, a conviction tainted with constitutional error is permitted to stand only if the reviewing court is convinced beyond a reasonable doubt that the error did not affect the result. In habeas cases, on the other hand, the conviction is sustained if the reviewing court is not left "in grave doubt" whether the error substantially or injuriously influenced the result.

Secondly, though – as this Court perhaps did not intend – in cases which specifically involve instructional errors misdefining the crime charged, a second-order difference has developed.[4] On direct appeal, the reviewing court looks to whether, upon the evidence, the jury findings that were made *necessarily* encompass findings that should have been made but were not due to the instructional error. Only if this is so as a matter of law will the verdict be sustained. In a habeas proceeding involving the same situation, however, the reviewing court looks at and weighs all the evidence presented in the case to determine whether a properly instructed jury *would have made* the missing findings – not whether they implicitly did.

In other words, in a habeas proceeding, the defendant's right to a jury verdict on the crime charged – even if conclusively shown to have been subverted – can be

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[4] A number of cases have already recognized this, *see, e.g., U.S. v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997); *Gilbert v. Moore*, 134 F.3d 642, 648 (4th Cir. 1998).

balanced against a reviewing court's view of the totality of the evidence presented on a cold record. This cannot happen on direct appeal. The nature of the proceeding – direct appeal or collateral review – is permitted to dictate two entirely different versions of the fundamental right to a jury trial. It seems arguable that this Court, in its brief opinion in *Roy*, did not mean to create such a complicated hierarchy of what are in essence different substantive rights for similar litigants in different stages of review. If this is so, it is appropriate that the matter be revisited now.

III. THE *BRECHT-KOTTEAKOS* STANDARD ALSO REQUIRES CLARIFICATION, SINCE, AS THIS CASE ILLUSTRATES, IT IS READILY MISAPPLIED.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court adopted a more lenient standard for assessing the harmlessness of constitutional errors noticed in federal collateral review of state criminal convictions. Such errors could be deemed harmless if the reviewing court was not "in grave doubt" about whether the error complained of influenced the verdict.

In the very cases articulating this standard, it is repeatedly said that this kind of harmless error analysis requires the reviewing court to determine whether the error probably affected the result, not whether the result would have ensued without the error. *See, Kotteakos v. U.S.*, 328 U.S. 750, 764-765, 776 (1946); *Sullivan v. Louisiana*, 508 U.S. 275, 278-279 (1993). Yet although this is said, harmless error analysis more often than not degenerates

into the creation of a hypothetical verdict. It did in this proceeding, both on the trial and appellate level. The District Court stated its final conclusion thus:

> "A review of the entire record leaves this Court with the definite conviction that Officer Kimery's death was not caused by petitioner's negligence . . . beyond any reasonable doubt, petitioner knew of the substantial likelihood that his conduct would result in Kimery's death."

The Ninth Circuit stated its conclusion thus:

> "His [Van Dyken's] testimony, when coupled with the other evidence, leaves us with no doubt that the jury, if properly instructed, would have found that he acted purposely in that he at least contemplated the same kind of harm that Kimery suffered."

Although the Court of Appeals had before it much material from the record[5] which documented the role that this critical intent instruction had played throughout two trials spanning 21 months, it chose to ignore all the historical material from which it could have analyzed the actual and probable effect of the erroneous instruction on the jury. Instead it followed the time-honored and illegitimate practice of analyzing the inculpatory evidence presented by the State at trial, and reaching its own verdict.

This Court has specifically condemned such a procedure:

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[5] This material is summarized in Appendix D hereto, which is a reprint of pages 41-51 of petitioner's brief to the Ninth Circuit.

> "To allow the error to be cured in this fashion would be to dispense with trial by jury. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the state would be sustainable on appeal."
>
> – *California v. Roy*, 519 U.S. at 7.

Sometimes, speculation seems unavoidable; it was not in this case, where a great deal of evidence from the record was available to aid in assessing the actual "effect or influence" which the erroneous instruction had on the verdict. If this Court is serious in its repeated pronouncements that harmless error analysis is more than a retrospective judicial verdict rendered on the basis of a review of trial evidence in a cold record, it must attempt to clarify the *Brecht* standard once more. It must do so by indicating clearly that actual historical events concerning judicial proceedings are compellingly relevant in evaluating the effect of identified errors on those proceedings.

This case was presented at the habeas stage in a manner which vividly articulated the difference between (1) inculpatory trial evidence; and (2) record facts pertaining to the role played by the erroneous jury instruction in the entire proceeding. It is the latter kind of fact that should be most relevant in a correctly conducted harmless error inquiry. This case is an ideal vehicle for exemplifying the distinction.

CONCLUSION

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED VAN DYKEN, Petitioner-Appellant, v RICK DAY; ATTORNEY GENERAL OF THE STATE OF MONTANA, Respondent-Appellees.	)	NO. CA 97-35550 DC No. CV-94-00006-CCL MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted July 6, 1998
Seattle, Washington

(Filed Nov. 16, 1998)

BEFORE: CANBY AND TASHIMA, CIRCUIT JUDGES, and TAKASUGI**, DISTRICT JUDGE.

Montana state prisoner Fred Van Dyken filed a 28 U.S.C. § 2254 habeas petition challenging his conviction

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Robert M. Takasugi, Senior United States District Judge, for the Central District of California, sitting by designation.

for deliberate homicide. He alleged that a jury instruction in his second trial misconstrued the word "purposely" as that word is used in the state's deliberate homicide law. The district court denied the petition. Van Dyken then moved the district court to reconsider its denial in light of a newly-issued Montana Supreme Court opinion that disapproved of a similar jury instruction. The district court denied the motion on the ground that any error was harmless. This court issued a certificate of appealability, and Van Dyken now appeals. We review de novo the district court's denial of Van Dyken's habeas petition, *Bonillas v. Hill*, 134 F.3d 1414, 1416 (9th Cir. 1998), and we affirm.

BACKGROUND

In 1984, Deputy Sheriff Allen Kimery stopped Van Dyken on a Montana highway for allegedly stealing gasoline from a Missoula convenience store. Van Dyken then killed Kimery with a single shot from a .357 Magnum pistol. Van Dyken never denied that he fired the shot, but he contended that he was intoxicated and did not intend to hit the officer when he fired. Montana twice tried Van Dyken for deliberate homicide, which the state defines as "purposely or knowingly caus[ing] the death of another human being." Mont. Code Ann. § 45-5-102 (1985). At the first trial, the judge instructed the jury that:

> For deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the (result of) death, but that he did it with the knowledge that he was causing or with the purpose to cause death.

> More specifically, the mental state "purposely" is the more serious or wrongful mental state and implies an objective or design. It is where a person's conscious object is to cause a particular result.

The jury hung because the jurors could not unanimously agree that Van Dyken was guilty of deliberate homicide as opposed to negligent homicide.

At the second trial, the court granted the state's request, over defense objections, to deliver an alternative deliberate homicide instruction that defined "purposely" as intending to engage in the conduct that caused death. The alternative instruction, which was based on language in *Montana v. Sigler*, 688 P.2d 749, 755 (Mont. 1984), *overruled in part by Montana v. Rothacher*, 901 P.2d 82, 85-87 (Mont. 1995), stated that:

> A criminal homicide is deliberate homicide if it is committed purposely or knowingly.
>
> *A person acts purposely with respect to conduct which is an element of the offense* or to a result which is an element of the offense *when he has the conscious object to engage in that conduct* or to cause that result.

(Emphasis added). The second jury convicted Van Dyken of deliberate homicide, and the court sentenced him to life imprisonment without the possibility of parole.

On direct appeal, Van Dyken argued that the instruction in the second trial was erroneous because it did not require the jury to find that he had intended to kill Kimery. *See Montana v. Van Dyken*, 791 P.2d 1350, 1362 (Mont. 1990). The Montana Supreme Court affirmed the conviction, reasoning that "a defendant can properly be

convicted of deliberate homicide even though he may not have intended that the death result from the act where he contemplated the same kind of harm or injury to the victim." *Id.* (citing *Sigler,* 688 P.2d at 757-58).

The federal district court then denied Van Dyken's subsequent habeas petition. Following that denial, the Montana Supreme Court partially overruled *Sigler. Rothacher,* 901 P.2d at 85-87. The law in Montana remains that a person kills purposely, even though he did not intend to kill, if he contemplated the same kind of harm to the victim. *Id.* at 85. The court in *Rothacher* concluded, however, that some of the language in *Sigler* had misled lower courts by suggesting that a person could kill purposely regardless of what result he intended. *Id.* at 85-86. Therefore, fearing that juries might confuse deliberate homicide with negligent homicide, the court expressly disapproved of jury instructions that failed to clarify the intent requirement of Montana's deliberate homicide law. *Id.* at 86-87. Van Dyken moved the district court to reconsider its denial of his habeas petition in light of *Rothacher.* The district court then concluded that, even if the challenged instruction were constitutionally defective, the error was harmless.

DISCUSSION

We assume for purposes of decision that the challenged instruction was constitutionally defective because it failed to make clear that a conviction under the "purposely" prong of Montana's deliberate homicide statute required a finding either of an intent to kill or of an intent to inflict an injury similar to the injury actually sustained

by the victim. *See Carella v. California*, 491 U.S. 263, 265 (1989) (holding that Due Process Clause requires government to prove every element of a charged offense); *Hennessy v. Goldsmith*, 929 F.2d 511, 514 (9th Cir. 1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . . "). We conclude that the error was harmless, however, because we are not in grave doubt about whether it had a "substantial and injurious effect or influence in determining the jury's verdict." *See California v. Roy*, 117 S. Ct. 337, 338-39 (1996) (holding that *Brecht/O'Neal* standard applies to collateral review of erroneous jury instruction).

Van Dyken argues that the first jury's inability to reach a unanimous verdict is persuasive evidence that the instructional error in the second trial was prejudicial. The second trial differed from the first trial in two important respects, however. In contrast to the instruction given at the second trial, the deliberate homicide instruction given during the first trial suggested that "purposely" required an intent to cause death; it did not state that the term also included an intent to cause an injury that was similar to the victim's actual injury. Thus, the first instruction imposed a greater burden on the prosecution than the deliberate homicide law actually required.

Even more important is the fact that Van Dyken testified only at his second trial. He could properly be found guilty of deliberate homicide if he killed Kimery either "purposely" or "knowingly." His testimony, when coupled with the other evidence, leaves us with no doubt that the jury, if properly instructed, would have found that he acted "purposely" in that he at least contemplated

the same kind of harm that Kimery suffered. The same evidence also establishes conclusively that Van Dyken "knowingly" killed Kimery: that is, in terms of the instruction correctly given, he was "aware that it [was] highly probable that the result [would] be caused by his conduct or the circumstance."[1] Van Dyken stated that he saw a police officer approach his car, that he aimed his pistol in the officer's general direction, that he intended to discharge the weapon, and that he knew that guns could kill. In addition, physical evidence established that Van Dyken must have fired his pistol with his right hand, turning and holding it outside of the driver's side window, and that Kimery was standing within a few feet of the weapon when Van Dyken pulled the trigger. Moreover, two hours before the shooting, witnesses heard Van Dyken declare that he would shoot a police officer if pulled over. Given this evidence, we conclude that the error in one prong of the deliberate homicide instruction had no substantial effect on the verdict.

We also note that the trial court properly instructed the jury regarding negligent homicide. The judge explained that:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result

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[1] The trial judge explained to the second jury that:

> A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance.

> from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation.

This instruction lessened the potential for the jury to conflate deliberate and negligent homicide. The jury was also thoroughly instructed on intoxication and its possible effect on intent and knowledge. In light of all the instructions, the possibility that the error in defining "purposely" misled the jury was exceedingly small. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (court determining whether erroneous jury instruction was harmless should consider instructions as a whole).

CONCLUSION

We assume for purposes of decision that the deliberate homicide instruction delivered during Van Dyken's second trial was constitutionally defective because it failed to set forth accurately the mens rea requirement for deliberate homicide. Like the district court, however, we conclude that the error was harmless because it had no " 'substantial and injurious effect in determining the jury's verdict.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

FRED DANIEL VAN DYKEN,

Petitioner,

-v-

RICK DAY, Director, Montana Department of Corrections,

Respondent.

CV 94-6-M-CCL

ORDER

(Filed Mar. 11, 1997)

* * *

Before the court is Petitioner's motion to alter or amend this court's judgment. Petitioner filed the motion pursuant to Rules 52 and 59, Fed. R. Civ. P. Respondent initially asserted that the Petitioner's motion presented no argument which the court had not already considered and rejected, and on this ground urged denial of the motion. The court agreed that the initial motion presented no new argument that had not already been considered and rejected. However, Petitioner subsequently filed a supplemental brief based upon a change in Montana case law regarding what is a proper mental state jury instruction for the crime of deliberate homicide.

Petitioner now asserts that *Montana v. Rothacher*, 901 P.2d 82 (Mont. 1995) (overruling to some extent the mental state jury instruction approved in *State v. Sigler*, 688

P.2d 749 (1984), *State v. McKimmie*, 756 P.2d 1135 (1988), and *State v. Byers*, 861 P.2d 860 (1993)), has invalidated the jury instructions given in Petitioner's second trial by clarifying that when the "purposely" prong of the mental state is at issue, the act in question must have been performed, at minimum, with the intent to cause an injury similar to the victim's injury. The jury instruction actually given required only that the jury find that the Petitioner intended to commit the act, without regard to what result he might have intended.[1]

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[1] The relevant portion of the jury instructions reads as follows:

> A criminal homicide is deliberate homicide if it is committed purposely or knowingly.
>
> A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.
>
> A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.
>
> * * *
>
> To convict the Defendant of deliberate homicide, the State must prove the following three elements:

Petitioner took the stand at his 1987 trial and testified that he saw a patrol vehicle's flashing lights, saw an officer walking up to his vehicle, and "threw a bullet over [his] left shoulder", but that he had no intent to kill the officer nor even any intent to shoot the officer or cause physical injury to the officer. The bullet that Petitioner "threw" over his shoulder pierced the heart of Missoula County Deputy Sheriff Allen Kimery, killing him. Expert testimony at trial indicated that the gun was fired from a short distance of approximately three feet.

> First, that the Defendant performed the acts causing the death of Alan Kimery;
>
> Second, that when the Defendant did so, he acted purposely or knowingly;
>
> Third, that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse. The State has the burden of proof to exclude mitigation beyond a reasonable doubt.

After giving an "acquittal first" transition instruction, the court also instructed the jury regarding negligent homicide:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

See Resp. Brief in Supp. of Mot. for Summ. Judg., App. B.

Petitioner's theory of the case was that he had perhaps committed negligent homicide, but not deliberate homicide. As Petitioner claims, however, the erroneous jury instruction as to the mental state of deliberate homicide gathers into its reach merely negligent conduct. *See State v. Lambert*, 929 P.2d 846 (Mont. 1996); *Byers v. Mahoney*, 929 P.2d 202 (Mont. 1996); *Rothacher*, 901 P.2d at 87. Therefore, Petitioner's argument is that he was denied a fair trial because the erroneous mental state instruction allowed the jury to convict him of deliberate homicide for merely negligent conduct. According to Petitioner, the erroneous instruction nullified his defense that he lacked the requisite mental state to commit deliberate homicide.

The jury instructions given in Petitioner's case were reviewed by the Montana Supreme Court and found to be sufficient. *Montana v. Van Dyken*, 791 P.2d 1350, 1362 (Mont.), *cert. denied*, 498 U.S. 920 (1990). However, Petitioner did not submit an appropriate mental state instruction and did not argue this precise point on direct appeal, arguing instead that the specific intent to kill must be an element of the crime. That question is well settled under Montana law, however, and it was proper that Petitioner's argument failed. *See, e.g., State v. Leyba*, 915 P.2d 794 (1996). What has changed is the Montana Supreme Court's interpretation of what jury instructions are sufficient to impart the meaning of the "purposely or knowingly" mental state. Petitioner's second trial fell squarely between *State v. Sigler*, 688 P.2d 749 (Mont. 1984), and *Rothacher*, 901 P.2d 82 (Mont. 1995), and during this period the Montana Supreme Court's pronouncements regarding proper instruction became somewhat clouded.

Respondent argues that this court must not apply the law of *Rothacher* to grant the petition for writ of habeas corpus because the error asserted pursuant to *Rothacher* is not of a constitutional magnitude. However, it is settled that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See also Hennessey v. Goldsmith*, 929 F.2d 511, 514 (9th Cir. 1991) ("Failure to properly instruct the jury regarding an element of the charged crime is a constitutional error that deprives the defendant of due process. . . . "). *Sandstrom v. Montana*, 442 U.S. 510 (1979), also underscores the constitutional importance of properly instructing a jury as to the required mental state of the offense of deliberate homicide.

However, even granting that *Rothacher* should be given retroactive application to Petitioner's collateral attack upon his sentence, and even assuming that the erroneous jury instruction as to mental state constitutes a constitutional trial error, this court is not prepared to grant the petition for writ of habeas corpus.

The standard for the granting of a habeas corpus petition is that the court must find that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, ___, 115 S. Ct. 992, 994-99, 130 L.Ed.2d 947 (1995). At the least, a court must have "grave doubt" as to whether there has been such a substantial and injurious effect or influence on the jury's verdict. *Id.* After careful scrutiny of the record, this court is convinced that any error in instructing the jury was harmless beyond a reasonable

doubt. *See Rose v. Clark*, 478 U.S. 570, 576 (1986) (An otherwise valid conviction may be upheld in spite of constitutional error in jury instructions if court "may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Petitioner's own testimony at trial shows that his conduct was not merely negligent. Petitioner, a man of above-average intelligence, TR 1806:10-13, testified that after Officer Kimery stopped his car, Petitioner saw Officer Kimery walk up to his car, TR 1624:18, and Petitioner fired his .357 magnum revolver at Officer Kimery – at a distance of less than a car's length. While denying that he had any intent to harm Officer Kimery, the only reason Petitioner could muster to explain his conduct was to say that he "just wanted to get out of there." TR 1606:22-23, 1607:13. Petitioner testified that he did not aim the gun directly at Officer Kimery, but Petitioner did acknowledge that he intended to shoot the gun, TR 1612:20, and that he aimed the gun in Officer Kimery's "general direction," TR 1634:19. Petitioner's own testimony makes clear that this shooting was no accident.

In addition, the State's case against Petitioner convincingly showed that Petitioner had a motivation to kill Officer Kimery in that Petitioner was driving a stolen vehicle, had a stolen gun in his possession, and was at that time on probation for a previous car theft. Additionally, just hours before Petitioner shot Officer Kimery, two witnesses heard Petitioner boast that he would use his gun to "blow away" a cop. TR 467:1-2; 514:17-18. The physical evidence indicated that Petitioner shot Officer Kimery by holding his gun outside the window of his car, TR 1278:23-25, 1279:1-2, and firing it at Kimery at nearly

point-blank range. TR 1292:18-21. Numerous witnesses who observed Petitioner both before and after the shooting testified that Petitioner was functioning quite well and did not appear to be intoxicated.

A review of the entire record leaves the court with the definite conviction that Officer Kimery's death was not caused by Petitioner's negligence but was caused by Petitioner's intention to commit serious bodily harm to Officer Kimery. Petitioner knew his gun contained live ammunition. Petitioner knew he was shooting at Kimery from a distance of less than 10 feet. Petitioner revealed in his testimony that his sole purpose or desire, at the time he shot Officer Kimery, was to flee in his car. Beyond any reasonable doubt, Petitioner knew of the substantial likelihood that his conduct would result in Kimery's death or serious injury.

Petitioner received a fair trial and a fair opportunity to present his version of the facts. The trial judge instructed the jury that they could consider Petitioner's voluntary intoxication in determining whether he possessed the requisite mental state. The trial judge also instructed the jury on the elements of the offense of negligent homicide. The trial judge permitted Petitioner's expert witness to testify that Petitioner lacked the requisite mental state to commit deliberate homicide due to alcohol intoxication. Petitioner had every opportunity to convince the jury that he did not possess the requisite intent to commit deliberate homicide, and this court is confident that correction of the potentially defective "purposely" jury instruction would not have changed the verdict.

For all these reasons and based upon the entire record, this court finds that the error in the mental state instruction, if any, is harmless beyond a reasonable doubt.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's motion to alter or amend judgment pursuant to Rules 52 and 59, Fed. R. Civ. P., is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 11th day of March, 1997.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX C

Filed Dec. 13, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
97-35550

FRED VAN DYKEN,

Petitioner-Appellant,

-vs-

RICK DAY,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Montana, Missoula Division

APPELLANT'S BRIEF

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[Pages 51-54 (Section III B) Of The Brief
Are Printed Below (footnotes omitted)]

* * *

B. **A fortiori**, VanDyken's conviction cannot stand if a modified **Carella** standard is used to assess harmless error.

As first pointed out in *Carella v. California*, 491 U.S. 263, 270-272 (1989) an erroneous jury instruction incorporating an illegal presumption or omitting or misdescribing an element of the offense may have to be evaluated for harmless error in a different manner than other trial errors. This is because an erroneous elements instruction can cause the jury to disregard important evidence or consider it in the wrong way, thus skewing the deliberative process more pervasively than, say, an item of erroneously admitted evidence would do. Also, of course, a defective elements instruction suggests that a jury may never have made an actual finding of guilt beyond a reasonable doubt as to every element of the offense, as required by *Winship*. *California v. Roy*, 117 S.Ct. at 339 (Scalia concurring); *U.S. v. Gaudin*, 115 S.Ct. 2310, 2319-20 (1995).

In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996), an [sic] habeas case, this Court applied the *Carella* harmless error analysis to a defective elements instruction, holding that the error could be harmless "only if review of the facts found by the jury establishes that the jury necessarily found the omitted element," 81 F.3d at 867.

In *California v. Roy*, 117 S.Ct. 337 (1996), the U.S. Supreme Court reversed, holding that the Ninth Circuit had erred by applying too rigorous a standard in lieu of the *Kotteakos* standard mandated by *Brecht-O'Neal*. In a concurrence, however, two justices opined that the Ninth Circuit was correct in assessing instructional errors for

harmlessness using the method of *Carella*, but that in doing so it should utilize the *Kotteakos* "fair assurance" standard of certainty, rather than the *Chapman* "beyond a reasonable doubt" standard required on direct review. As a result, it is still an unsettled question whether or not error in elements instructions should be assessed by means of the special method outlined in *Carella*, or, on the contrary, should be evaluated for harmlessness in the same manner as all other trial errors. See, *Roy v. Gomez*, 108 F.3d 242, 243-246 (9th Cir. 1997); *Peck v. U.S.*, 102 F.3d 1319, 1320-27 (2nd Cir. 1996).

It certainly makes a difference which method is used. In the instant matter, for instance, use of the *Carella* model would lead to a summary determination that the error was not harmless, without the necessity to consider all the factors which have been reviewed here. This is because the jury's guilty verdict in no way demonstrates that the jury "necessarily found" that VanDyken intended or foresaw Kimery's death. With the *Sigler* instruction, it is perfectly possible that the verdict rested on a determination that VanDyken was simply not unconscious during the relevant transaction; or, alternatively, on the determination that he meant merely to shoot the gun, or meant to engage in a number of other unspecified acts, none of which was necessarily connected to any contemplation of or desire for a person's death. In these circumstances, "no court could ever determine that the instructions on the element were superfluous, since the error in the instructions went to the ultimate fact that the jury was required to find," *Pope v. Illinois*, 481 U.S. 497, 510 (1987).

It would appear that a modified *Carella* standard comports with the common-sense notion that when a jury is seriously misled as to exactly what the State has to prove, and the jury has to find, to establish guilt of the crime charged, then it makes little sense to ask if that error affected the verdict. *Of course* it affected it, in the sense that the jury necessarily fitted all the evidence into the wrong framework, drew the wrong conclusions from the predicate facts; and may well have convicted the defendant of the wrong crime (possibly a non-existent crime). Logically, the only way the jury could have avoided doing these things would be if it simply never heard, read or used its instructions at all.

This being the case, a rule like *Carella's* which "circumscribes" the scope of the harmless error review seems preferable from the logical point of view. True, it makes this kind of error a kind that can rarely be harmless. But that is not inappropriate when the error has the inevitable effect of directing the jury to process *all the evidence* in the wrong way; or, in other words, when it focusses [sic] the jury's analytical attention on a perhaps fictitious crime, but at any rate on a crime with which the defendant on trial was never charged.

* * *

APPENDIX D

Filed Dec. 13, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
97-35550

FRED VAN DYKEN,

Petitioner-Appellant,

-vs-

RICK DAY,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Montana, Missoula Division

APPELLANT'S BRIEF

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[Pages 41-51 (Section III A) Of The Brief
Are Printed Below (footnotes omitted)]

* * *

A. VanDyken's conviction cannot stand if the lenient **Brecht-Kotteakos** standard is used to assess harmless error.

In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) and *O'Neal v. McAninch*, 115 S.Ct. 992 (1995), the U.S. Supreme Court adopted a more lenient standard for evaluating the potential harmlessness of constitutional errors, when such errors were being claimed under in habeas proceedings, as opposed to direct appeal. The standard adopted for habeas proceedings was that articulated in *Kotteakos v. U.S.*, 328 U.S. 750, 764-765, 776 (1946):

> "if the court's conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

This is the most lenient harmless error standard in use, in the sense that it permits more judgments predicated on constitutional trial error to be upheld than any other articulated standard. Even so, as *O'Neal* made clear, it does not relieve the beneficiary of the error (the State) of the burden of showing that an error was harmless, *O'Neal*, 115 S.Ct. at 995-96. Furthermore, it in no way changes the basic structure of harmless-error analysis,

which is to determine whether the error probably affected the result, not whether the result probably would have ensued without the error.

> "Consistent with the jury trial guarantee, the question a reviewing court must consider is not what effect the constitutional error might generally be expected to have on a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless error review looks, we have said, to the basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. This must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee."
>
> –*Sullivan v. Louisiana*,
> 113 S.Ct. 2078, 2081-82 (1993).

Accord, Yates v. Evatt, 111 S.Ct. 1884, 1893 (1991); *Pope v. Illinois*, 481 U.S. 497, 509-510 (1987).

Leaving aside, then, for the time being, the question whether an error in the jury instruction that defined the crime "necessarily circumscribes the availability of harmless error analysis," *Carella v. California*, 491 U.S. 263, 269 (1989), let us see if the U.S. District Court's finding of harmless error in the VanDyken trial is valid under *Kotteakos*.

The first thing that leaps out at us from the District Court's analysis is that it takes no account whatsoever of the objective facts in the record which give some indication of whether or not "the error itself had substantial influence on the jury." It doesn't even mention that a different intent instruction was given at VanDyken's first trial, that after that instruction was given the jury hung, and that the prosecutor twice asserted on the record that it was the intent instruction that caused the jury to hang. Nor does it mention that the prosecutor relied explicitly and extensively on the erroneous instruction in his closing argument at the second trial. Nor does it even so much as allude to the fact that the prosecution devoted vast time and effort between trials attempting to keep the correct instruction from being given and to cause the erroneous instruction to be given – surely an indication that the State, at least, believed that the intent instruction would have "a substantial influence on the verdict." The District Court's analysis ignores every fact of record in this case from which one could reach reasonable conclusions about *what influence the error had upon what the Jury actually did.*

In fact, the District Court opinion in this case does just what the *Kotteakos* standard tells it not to do: "the inquiry *cannot* be merely whether there was enough to support the result, apart from the phase affected by the error." Yet the District Court, in concluding that the erroneous intent instruction was harmless, does literally nothing but catalogue the evidence of intent presented at the second trial. It completely dispenses with any discussion or analysis of the role the erroneous instruction

played in the actual case – which was a conspicuous role, to say the least.

Not only does the District Court disregard the admonition of *Kotteakos* to pay attention to what actually happened; it also disregards the admonition of *Sullivan* not to let harmless error analysis degenerate into the creation of a hypothetical verdict. Here is the District Court's final conclusion in this matter:

> "A review of the entire record leaves this court with the definite conviction that Officer Kimery's death was not caused by petitioner's negligence, but was caused by petitioner's intention to commit serious bodily harm to officer Kimery. Beyond any reasonable doubt, petitioner knew of the substantial likelihood that his conduct would result in Kimery's death . . . "

– ER, 99.

This conclusion suffers from legal error to an extreme degree, of a kind precisely identified in *California v. Roy*, 117 S.Ct. at 339:

> "To allow the error to be cured in this fashion would be to dispense with trial by jury. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal."

As stated in *Carella v. California*, 491 U.S. at 269:

> "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of

> a defendant resulting from the court's failure to instruct it to find an element of the crime. . . .
>
> ". . . . [this problem] would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.' "

Accord *Sullivan*, 113 S.Ct. at 2082.

The District Court, then, in denying VanDyken habeas relief on the basis of harmless error, fell into the two analytical errors most often condemned in this area of law: (1) it ignored the objective facts of the proceedings from which a person could draw reasonable conclusions about what the jury actually did, and whether the error really was significant or not; (2) it substituted its judgment of guilt beyond a reasonable doubt, based on its view of the evidence, for the jury's judgment. This being so, it still remains to be seen whether the court's conclusion, though wrongly arrived at, is in any measure sustainable.

Here are the main indications that the error was not harmless:

1. The outcome of the trial hinged on the jury's determination on intent. The parties, realizing this, offered radically different versions of an intent instruction at both trials, and litigated the matter extensively between trials. Their disagreement on this issue for the last twelve years has focused on the so-called *Sigler* instruction, an intent instruction which lessens the State's burden of proof by permitting the jury to find criminal

intent in some manner from an undirected consideration of "conscious conduct."

2. The intent instruction issue was characterized by the prosecutor at various times as "fundamental" and as "critical." The State thought it was vitally important, especially at the second trial, for the jury to receive an instruction that lessened the State's burden of proof on the key contested element of the offense. Pursuant to this strategic judgment, one of the prosecution's primary goals from start to finish was to persuade the court to give a *Sigler* instruction and refuse the defense instructions – both the *Weinberger* instruction (Instruction G), and the *Lambert* instruction (the statutory definitions of purposely and knowingly with the "conduct" and other irrelevant subparagraphs eliminated). The State invested a great deal of time and energy in this project, as indicated by the elaborate briefs and oral arguments it submitted on the issue.

3. One good indication that a matter had substantial influence on a jury is that the parties thought it would and did. Neither the prosecution nor the defense in a major jury trial can afford to, nor do they, waste their time on unimportant or collateral matters. While their judgments on what will affect the jury are not, of course, infallible, they are focused by adversarial interest, and honed fine by familiarity with the nuances of the proceeding. The fact that both the prosecution and defense always thought the intent instruction was critical is a far more reliable indication of its importance than a judgment made on a cold record a decade later by a judge who was entirely unfamiliar with the emotional tone and

dynamics of the proceedings, and, for that matter, unfamiliar with State jury trial practice in general.

4. Another very good indication of what substantially influenced a jury is *evidence* of what influenced it. The first VanDyken trial jury requested a supplemental instruction on intent on its own initiative. It is the only thing it requested. As the trial judge remarked at the time, the jury was "paying a lot of attention to the definitions of knowingly and purposely" [ER, 8].

5. The State twice represented in open court that the first trial jury's failure to agree on a verdict was *caused* by the supplemental intent instruction. This unequivocal declaration is binding on the State, and is in many respects conclusive of the matter. According to the State, the intent instruction not only had substantial, it had outcome-determinative effect on the jury. How can the State now argue that the instruction (in the words of *Kotteakos)* "did not influence the jury, or had but very slight effect?"

6. The prosecutor structured his entire closing argument at the second trial around the *Sigler* intent instruction. First, he carefully quoted the instruction for the jury (it was the *only* instruction he mentioned in his lengthy argument); then he even more carefully paraphrased it for the jury, quoting *only the objectionable, burden-lessening language* [ER, 43, lines 3-11]. "Think about those words," he said. Then he proceeded to articulate evidence of isolated items of conduct "of which the defendant was aware," as conclusive evidence of criminal intent. One of the matters he most relied upon was the State psychiatrists' conclusion that VanDyken acted "with purpose"

because he intended to shoot the gun. Rarely if ever did the prosecutor suggest that VanDyken intended to kill in the normal – and legally correct – sense of the term. Time and again, he asked the jury to convict on the alternative *Sigler* theories: (1) that the defendant was not unconscious or asleep during the transaction; (2) that he was "aware of" certain isolated segments of his conduct. If the *Sigler* instruction did not have a substantial influence on the jury, why did the prosecutor, in one of the most important cases of his career, organize his closing argument around the burden-lessening portion of that instruction?

7. No one was in a better position to know what was going to influence the second trial jury than the prosecutor. All his actions reveal he thought the *Sigler* instruction would have immense influence. Probably for that reason, the State never raised the issue of harmless error in this case, either on direct appeal or in the U.S. District Court. While harmless error is probably not an issue subject to technical waiver, still "the government's failure to brief and argue harmless error is itself an indication it recognized how harmful the [erroneous instruction] was," *Lufkins v. Leapley*, 965 F.2d 1477, 1486-87 (8th Cir. 1992).

Now, as against these indications – all drawn from the record – that the error was not harmless, what support is there for the District Court's conclusion that it was harmless? Only speculation. Only its supposition that, because the State's evidence of criminal intent seemed to it, from a cold record, strong and convincing, the evidence must have affected the jury the same way, to a

degree that they paid no or scant attention to the instruction on intent. The evidence introduced by the State at trial is, of course, what it is; but the fact remains, *there is no evidence at all the intent instruction was unimportant to the jury.*

The State will presumably try to characterize the evidence of intent offered at trial as "overwhelming evidence." The record – not anyone's opinion, but the record – demonstrates that this would be a mischaracterization. The evidence catalogued by the habeas court as convincing it beyond a reasonable doubt that VanDyken meant to kill Kimery, is identical to the catalogue of evidence marshalled by the prosecutor in his closing argument *at the first trial* in an attempt to convince the jury of the same proposition. That jury hung. Not only did it do that, but – according to juror affidavits procured and utilized by the State – it hung with some of the jurors voting for mitigated and some voting for negligent homicide, and with the final stage of the deliberations devoted to attempting to arrive at a compromise verdict [ER, 10-11; 18; 19]. Overwhelming evidence, by any definition, does not produce that result.

The history of this case, in fine, is this: the first jury heard the evidence, the strong evidence, of VanDyken's guilt, received a correct instruction on intent, and failed to reach a verdict. The second jury heard the same evidence, received an erroneous instruction lessening the State's burden of proof on intent, and convicted. According to *Kotteakos*, "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error . . . the conviction

cannot stand." There is not one fact of record concerning "all that happened," that suggests the judgment was not substantially swayed by the error. The conviction cannot stand.

* * *

Supreme Court, U.S.
FILED
MAR 31 1999
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No. 98-1273

In The

Supreme Court of the United States

October Term, 1998

FRED VAN DYKEN,

Petitioner,

v.

RICK DAY, Director,
Montana Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32pp

QUESTION PRESENTED

Given that the Petitioner offered a mental state instruction that was an incorrect statement of state law, that the jury was correctly instructed on the definitions of "knowingly" and "negligently," and that Petitioner's own testimony conclusively established that he purposely or knowingly killed the victim, did the court below err in affirming the denial of habeas relief on the ground that any instructional error in the definition of "purposely" did not have substantial and injurious effect or influence in determining the jury's verdict?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix to the Petition at App. 1. The underlying opinion of the United States District Court for the District of Montana is reprinted in the Appendix to the Petition at App. 8.

JURISDICTION

Respondent concurs that jurisdiction is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the constitutional provisions included by Petitioner, the following state statutes are pertinent to review of this matter:

Mont. Code Ann. § 45-5-101(1) (1983):

> A person commits the offense of criminal homicide if he purposely, knowingly, or negligently causes the death of another human being.

Mont. Code Ann. § 45-5-102(1)(a) (1983):

> [C]riminal homicide constitutes deliberate homicide if: (a) it is committed purposely or knowingly; . . . .

Mont. Code Ann. § 45-2-101(33) (1983):

> "Knowingly" – a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when

> he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct.

Mont. Code Ann. § 45-2-101(58) (1983):

> "Purposely" – a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result.

INTRODUCTION

Jury instructions given at Petitioner's deliberate homicide trial required the jury to find Petitioner guilty if it found he acted purposely or knowingly in shooting Missoula County Deputy Sheriff Allen Kimery. The trial court refused an instruction offered by Petitioner that the jury must find he acted "with the knowledge he was causing or with the purpose to cause the death." On appeal, the Montana Supreme Court held that Petitioner's proffered instruction was not a correct statement of state law. Eight years later, the state's high court invalidated as an incorrect statement of state law an instruction – not given at Petitioner's trial – that deliberate homicide is committed when the act is done purposely without regard to the result intended.

Given that Petitioner's jury was instructed on the mental state elements of the offense, that it was correctly told "knowingly" means a person "is aware that it is

highly probable that the result will be caused by his conduct," and that it was also instructed on the elements of negligent homicide, the court below found any error "in one prong" of the "purposely" instruction to be harmless in light of the physical evidence at trial and Petitioner's own testimony which established conclusively that he purposely or knowingly killed Officer Kimery.

STATEMENT OF THE CASE

Petitioner was convicted by a state court jury in June 1987 of deliberate homicide arising from the 1984 shooting death of Missoula County Deputy Sheriff Allen Kimery. The Montana Supreme Court affirmed his conviction, *State v. Van Dyken*, 791 P.2d 1350 (Mont. 1990), and his petition for a writ of certiorari was denied by this Court, *Van Dyken v. Montana*, 498 U.S. 920 (1990).

Petitioner filed a petition for writ of habeas corpus on January 11, 1994, and final judgment was entered in Respondent's favor on May 11, 1997. (Pet. Cert. at App. 8.) Following appeal to the Ninth Circuit United States Court of Appeals, the district court's judgment denying the petition for habeas corpus was affirmed on November 16, 1998. (Pet. Cert. at App. 1.)

At his trial, Petitioner admitting shooting Officer Kimery after being stopped on suspicion of gasoline theft in the early morning hours of December 6, 1984. Petitioner claimed, however, that he did not intend to kill Officer Kimery. Both parties presented expert testimony as to whether, given the level of his alcohol consumption, Petitioner had the capacity to act purposely or knowingly

at the time the shot was fired. As discussed by the court below, the evidence at trial showed that Officer Kimery was standing just a few feet from the gun when he was shot; that Petitioner had to turn and hold the gun outside the driver's side window in order to fire the shot; and that Petitioner, who was driving a stolen car at the time, had declared earlier in the evening that he would shoot a police officer if pulled over. Moreover, Petitioner himself testified that he saw a police officer approach his car, he aimed the gun in the officer's general direction, he intended to fire the gun, and he knew guns could kill.

The trial court instructed the jury that in order to convict Petitioner of deliberate homicide it must find the following elements beyond a reasonable doubt:

> First, that the Defendant performed the acts causing the death of Alan [sic] Kimery;
>
> Second, that when the Defendant did so, he acted purposely or knowingly;
>
> Third, that when the Defendant did so, he was not suffering from extreme mental or emotional stress for which there is reasonable explanation or excuse.

The jury was given additional instructions with respect to the meaning of "purposely" and "knowingly." (App. 1a.) In addition, it was instructed on the elements of negligent homicide and the definition of criminal negligence. (App. 1a-2a.) Finally, the jury was expressly instructed that it could consider Petitioner's intoxication in determining whether he possessed the requisite mental state to commit the offense. (App. 2a.)

Petitioner proposed, and the trial court rejected, an instruction that would have required the jury to find he had acted "with the knowledge he was causing or with the purpose to cause the death." On direct appeal, the Montana Supreme Court held that Petitioner's "proposed instruction is not the law in Montana." *Van Dyken*, 791 P.2d at 1362. Eight years after Petitioner's conviction became final, the Montana Supreme Court decided *State v. Rothacher*, 901 P.2d 82 (Mont. 1995), invalidating the following jury instruction as an incorrect statement of Montana law:

> In order to convict the defendant of Deliberate Homicide, it is not necessary for the State to prove that the defendant intended to cause [the] death of [the] victim. Death may not be the intended result, *but, if the act which causes the death is done purposely*, and no circumstances of mitigation, excuse or justification appear, deliberate homicide is committed unless the result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

901 P.2d at 84. While the court reaffirmed long-standing Montana law that specific intent is not required for deliberate homicide, the above instruction was rejected because – as stated in the court's opinion in *Van Dyken* – the statute "does at least require that [the defendant] intended a similar kind of harm." *Id.* at 85. Thus, "[i]t is not sufficient . . . that the act which caused the harm be done purposely without regard to whether *any* harm was intended." *Id.*

The instruction found offensive in *Rothacher* was not given at Petitioner's trial. In fact, the jury was not

instructed that a conviction could be had simply on evidence that Petitioner was "aware of his conduct," even though the statutory definition of "knowingly" encompassed that concept. The trial court acknowledged that Montana law allowed the jury to convict Petitioner "if [the jurors] agree that he intended to shoot Sgt. Kimery but did not intend to kill him." (Trial Tr. at 1834.) That statement was cited approvingly in the Montana Supreme Court's decision affirming Petitioner's conviction, *Van Dyken*, 791 P.2d at 1362, and was not affected by *Rothacher*, 901 P.2d at 85.

The court below, as had the district court, "assume[d] for purposes of decision" that the mental state instruction given at Petitioner's trial was constitutionally defective because it failed to make clear that conviction required a finding either of an intent to kill or of an intent to inflict an injury similar to the injury actually sustained by the victim. The court concluded, however, that "the error was harmless because it had no 'substantial and injurious effect in determining the jury's verdict.' " (Pet. Cert. at App. 7) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), and *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

SUMMARY OF ARGUMENT

This case does not present a significant constitutional or federal question for determination by the Court. The Ninth Circuit's application of the harmless error standard is consistent with previous decisions of this Court and gives appropriate deference to the finality of the state

courts' determinations. Petitioner was convicted under jury instructions that correctly stated Montana law at the time of trial and, viewed as a whole, properly set forth each element of the offense with which Petitioner was charged. Even if the Court were inclined, as Petitioner requests, to adopt the harmless error approach suggested in Justice Scalia's concurring opinion in *California v. Roy*, 519 U.S. 2, 6 (1996) (per curiam), this case does not present the appropriate vehicle in which to do so. The jury instructions adequately covered all elements of the offense and left no room for the jury to convict Petitioner without finding that he intended to cause the victim's death or knew there was a high probability his actions would bring about that result.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S APPLICATION OF THE *BRECHT* HARMLESS ERROR STANDARD DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER CIRCUIT COURTS OF APPEAL.

Citing *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam), the court below determined that any instructional error in this case was harmless because the court was "not in grave doubt about whether it had a 'substantial and injurious effect or influence in determining the jury's verdict.' " (Pet. Cert. at App. 5.) This is a proper application of the harmless error standard on collateral review of jury instructions that incorrectly define the crime or misdescribe an element of the crime. In *Roy*, this Court made clear "that for reasons related to the special

function of habeas courts, those courts must view [trial] error under the *Kotteakos* standard." 519 U.S. at 6.

The *Kotteakos* standard for harmless-error review requires reversal of a conviction only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Since *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), it has been settled that this standard applies on habeas review of trial errors. *Roy* clarified that instructional errors amounting to a misdescription of an element of the charged offense are trial errors subject to the same standard. 519 U.S. at 5-6. Only if the habeas court "is in grave doubt as to the harmlessness" of the error should it grant relief. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

Despite Petitioner's claim that *Roy* requires clarification to determine " 'what *constitutes* the harmlessness to which this more deferential standard is applied,' " (Pet. Cert. at 5) (quoting *Roy*, 519 U.S. at 6 (Scalia, J., concurring)), there is no compelling split of authority among the circuit courts that calls out for additional explanation of the standard. The courts are in harmony in their application of *Roy* to collateral review of trial errors involving jury instructions. *United States v. Santopietro*, 166 F.3d 88, 94 (2d Cir. 1999); *Gilbert v. Moore*, 134 F.3d 642, 648 (4th Cir.), *cert. denied*, 119 S. Ct. 103 (1998); *Harris v. Warden, La. State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Jenkins v. Nelson*, 157 F.3d 485, 494-95 (7th Cir.), *petition for reh'g denied*, 1998 U.S. App. LEXIS 27874 (7th Cir. 1998); *Stanton v. Benzler*, 146 F.3d 726, 728 (9th Cir. 1998); *Peck v. United States*, 106 F.3d 450, 455 (2d Cir. 1997); *Smith v. Horn*, 120 F.3d 400, 417 (3d Cir. 1997), *cert. denied sub nom.*,

District Attorney of Bucks County v. Smith, 118 S. Ct. 1037 (1998). While the Tenth Circuit has applied the *Roy* concurrence to "shed[ ] light on" the court's harmless-error analysis of a faulty jury instruction, it nonetheless found the error harmless where the necessary jury findings satisfied all the requirements needed for conviction. *United States v. Holland*, 116 F.3d 1353, 1357 n.3, and 1359 (10th Cir.), *cert. denied*, 118 S. Ct. 253 (1997).

Aside from *Holland*, which used the Scalia concurrence as "guidance," 116 F.3d at 1357 n.3, the circuit courts appear to be uniform in their approach to determination of harmless error on collateral review of defective jury instructions:

> The distinction between the type of harmless-error review necessary on direct review compared to that applicable in habeas review is especially well defined in the context of an improper jury charge. The Supreme Court has instructed that in assessing whether an improper jury instruction had a substantial and injurious effect on the verdict, a court need not conclude that " 'the facts found by the jury establish[ ] that the jury necessarily found' " the element on which the improper instruction was given as would be required on direct review.

Gilbert, 134 F.3d at 648. *See also Jenkins*, 157 F.3d at 495-96; *Dyer v. Calderon*, 122 F.3d 720, 737-38 (9th Cir. 1997), *vacated on other grounds*, 151 F.3d 970 (9th Cir. 1998). There are no direct conflicts between the circuits that justify a grant of certiorari in this case.

II. THE *KOTTEAKOS* STANDARD OF HARMLESS-ERROR REVIEW IS CONSISTENT WITH THIS COURT'S HABEAS CORPUS JURISPRUDENCE AND APPLIES PROPER DEFERENCE TO STATE COURT JUDGMENTS.

A. Applying Standards on Collateral Review Less Onerous Than the Standard of Review on Direct Appeal Is an Appropriate Recognition of the States' Interest in Finality.

This Court has recognized that the *Kotteakos* standard "is better tailored to the nature and purpose of collateral review than the [more stringent] *Chapman [v. California*, 386 U.S. 18 (1967)] standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The Court noted in *Brecht* that "the writ of habeas corpus has historically been regarded as an extraordinary remedy, 'a bulwark against convictions that violate "fundamental fairness." ' " *Id.* at 633-34 (internal citations omitted). Thus, although Petitioner complains that *California v. Roy* creates "a confusing two-tier 'double standard' in harmless error jurisprudence as between collateral review and direct appeal" (Pet. Cert. at 8), "it hardly bears repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.' " *Brecht*, 597 U.S. at 634 (internal citations omitted).

The states' interest in the finality of convictions that have survived direct review within the state court system counsels adherence to the *Kotteakos* standard of harmless-error review. *Roy*, 519 U.S. at 6 ("for reasons related to

the special function of habeas courts, those courts must review [trial] error . . . under the *Kotteakos* standard"). "Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Brecht*, 697 U.S. at 637. The Court's observance in *Brecht* that the lack of a statute of limitations in habeas cases adds to the "social costs" of reversing state court judgments is well illustrated instantly, where Petitioner seeks relief on the basis of a change in state law decided nearly a decade after his conviction and where the validity of the jury's verdict is not suspect even in light of that state law change.

—

B. Jury Instructions Given in a State Criminal Trial Must Be Reviewed by a Habeas Court as a Whole and in the Context of the Entire Trial.

It is well settled that jury instructions must be evaluated by a habeas court in the context of the overall charge to the jury, and as a component of the entire trial process. The court's review is limited to determining whether an erroneous instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Habeas relief is not warranted "simply because the instruction may have been deficient" under state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Further, while due process requires a state to prove every element of the crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), "the Constitution

does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). The question when reviewing jury instructions in the context of a petition for writ of habeas corpus "is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Id.* at 6.

C. Applying Proper Standards of Review, the Court Below Correctly Found That if There Was Error in the Instructions, It Was Harmless.

The error asserted by Petitioner in his petition for writ of habeas corpus was that the jury instructions given at his trial "convert[ed] the offense of deliberate homicide into a strict-liability offense." (App. 6a.) Petitioner proposed an instruction that would have required the jury to find he acted "with the knowledge that he was causing or with the purpose to cause the death." (App. 8a.) On direct appeal, the Montana Supreme Court held that Petitioner's "proposed instruction is not the law in Montana." *State v. Van Dyken*, 791 P.2d 1350, 1362 (Mont. 1990).

Although the Montana Supreme Court later held invalid an instruction that informed the jury it could convict a person of deliberate homicide without regard to the result intended, *State v. Rothacher*, 901 P.2d 82 (Mont. 1995), Montana law remains that a specific intent to kill is not required, so long as the act which causes the death is done purposely or knowingly within the meaning of the state statutes. *State v. Leyba*, 915 P.2d 794, 798 (Mont.

1996). The concern identified in *Rothacher* was that a negligent homicide situation might become deliberate homicide as a result of the erroneous instruction allowing conviction if the act causing the death was done purposely unless the result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense. 901 P.2d at 88.

At Petitioner's trial, the jury was fully instructed on the state law elements of deliberate homicide, was instructed on the definition of negligent homicide, and was instructed that it could consider Petitioner's intoxication in determining whether he had the requisite mental state to commit the offense. The jury was *not* given the instruction later invalidated by the Montana Supreme Court. Moreover, the trial court omitted the first clause of the statutory definition of "knowingly" – that a defendant acts "knowingly" if he "is aware of his conduct." Mont. Code Ann. § 45-2-101(33) (1983). With that omission, the trial court appropriately focused the jury's attention on the *results* of Petitioner's conduct, agreeing that he could not be convicted of deliberate homicide "if he performed acts that caused the death of [Officer] Kimery, but he was not aware that the result of death might occur from his conduct." (Trial Tr. at 1829.) As noted by the court below, the evidence established conclusively that Petitioner "knowingly" killed Officer Kimery under the terms of this correct instruction. (Pet. Cert. at App. 6.)

The decision below also emphasized the instruction on negligent homicide, noting that it "lessened the potential for the jury to conflate deliberate and negligent homicide." (Pet. Cert. at App. 7.) Because of the instruction on

negligent homicide, the jury was well aware of the difference between offense levels when it entered its deliberations.

Finally, it is important to consider the allegedly defective instruction in the context of the trial record. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner fails to acknowledge the clear record which shows that both parties argued the case to the jury with an emphasis on Petitioner's knowledge and purpose to kill or at least seriously injure Officer Kimery. Without objection, defense counsel even stated in her argument that the State was required to prove that Petitioner "had the intent to kill Allen Kimery and there was absolutely no mitigating surrounding circumstances if and when that happened." (Trial Tr. at 1890-91.) The prosecutor, in turn, argued: "[T]o say that he didn't know what he was doing, that he didn't know that when he fired that bullet at that range at that officer . . . that he would kill him, is absurd." (Trial Tr. at 1872.) The case clearly was presented to the jury as a case in which it had to find that Petitioner's actions were deliberate in order to convict him of the most serious degree of homicide under Montana law.

On the whole, as noted by the court below, "the possibility that the error in defining 'purposely' misled the jury was exceedingly small." (Pet. Cert. at App. 7.) The court thus correctly concluded that the error was harmless because it had no substantial and injurious effect in determining the jury's verdict.

III. THIS IS NOT AN APPROPRIATE CASE TO REVISIT *CALIFORNIA v. ROY* OR THE APPROPRIATE HARMLESS-ERROR STANDARD ON COLLATERAL REVIEW OF JURY INSTRUCTIONS.

Petitioner argues that the Court should accept jurisdiction of this case to establish that instructional error can be harmless, even on collateral review, " 'only if the jury verdict on other points effectively embraces this one, or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.' " (Pet. Cert. at 7) (quoting *Roy*, 519 U.S. at 7 (Scalia, J., concurring)). Notwithstanding Petitioner's failure to address the propriety of a more deferential standard of review in habeas corpus cases, this case simply does not present the appropriate opportunity to revisit the concurrence in *Roy*.

The concurring members of the Court in *Roy*, observing that the jury is required to find a defendant guilty of each necessary element of the crime, noted that such a verdict, "[f]ormally, at least," did not exist in that case: "[T]he jury was never asked to determine that Roy had the 'intent or purpose of committing, encouraging, or facilitating' his confederate's crime." 519 U.S. at 7 (Scalia, J., concurring). The concurrence further noted that the error could be harmless only if the verdict on other points "effectively embraces" the omitted element "or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding [that element] as well." *Id.*

Here, the instructions *did* ask the jury to determine all of the facts necessary to constitute the offense under state law. It was instructed that it must find the defendant purposely or knowingly committed the acts that caused the death of Officer Kimery. Embraced within that instruction are the components of both conduct and result. The jury was also instructed that in order to find Petitioner acted "knowingly" it had to find he was aware of a "high probability" that death would result from his conduct. The jury was never told that it could convict Petitioner simply upon evidence that he was "aware" that he was pulling the trigger, without regard to the likely result.

The lone possible instructional error found by the court of appeals was in the following definition of "purposely":

> A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.

(App. 1a.) Any error was in the trial court's omission of an instruction that Petitioner must intend at least a similar kind of harm in order to be found to have acted purposely.

When viewed in the context of all the other instructions, including the instructions defining "knowingly," "negligence," and the effect of intoxication, any misdescription of the "purposely" element of the offense can hardly be found significant, even under the analysis employed in the *Roy* concurrence. The jury simply was

not instructed or led to believe that it could convict Petitioner of deliberate homicide on the basis of conduct alone, without regard to the result he intended.

These facts do not present a compelling case on which the Court should reexamine its harmless-error analysis of faulty jury instructions on collateral review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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April 1999

APPENDIX

A person acts purposely with respect to conduct which is an element of the offense or to a result which is an element of the offense when he has the conscious object to engage in that conduct or to cause that result.

A person acts knowingly with respect to the result of conduct or a circumstance described by a statute defining an offense when he is aware that it is highly probable that the result will be caused by his conduct or the circumstance. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowingly" or "with knowledge" have the same meaning.

(Trial Tr. at 1837.)

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the person's failure to recognize it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would exercise in that situation. "Gross deviation"

means a deviation that is considerably greater than lack of ordinary care.

(Trial Tr. at 1839.)

A person cannot escape criminal responsibility for his conduct simply by being in an intoxicated or drugged condition. However, such a condition may be taken into consideration in determining the existence or non-existence of a mental state which is an element of the offense.

In other words, where knowledge or purpose are elements of a crime, a condition of intoxication or of being drugged, from whatever cause, which might prevent one from knowing or having the purpose essential to the crime, are to be taken into consideration in determining whether the Defendant is guilty or not guilty of the crime.

(Trial Tr. at 1842-43.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FRED DANIEL VAN DYKEN, Petitioner, -vs- JAMES M. GAMBLE, Administrator, Montana Dept. of Corrections, Custodial Respondent, and ATTORNEY GENERAL OF THE STATE OF MONTANA, Additional Respondent.	Cause No. CV 94-6-M (Filed Jan. 11, 1994)

****

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

COMES NOW the Petitioner, Fred D. VanDyken, by and through counsel, and, pursuant to 28 U.S.C. Section 2254, petitions this Court to issue a Writ of Habeas Corpus vacating his conviction and sentence herein as being unconstitutionally obtained and imposed. In support of this Petition, Petitioner states:

1. He is presently incarcerated at the Montana State Prison, Deer Lodge, Montana, 59722. His prison number is AO21997.

2. Petitioner was convicted of deliberate homicide in Cause Number 6877, Montana Fourth Judicial District Court, Missoula County, Missoula, Montana. By Judgment dated September 1, 1987, in that cause, he was sentenced to life imprisonment without eligibility for parole.

3. Petitioner was, on December 11, 1984, charged by Information with deliberate homicide. He pled not guilty. Pursuant to a change of venue, he was tried before a jury in Park County, Montana, on September 9-21, 1985, Honorable Thomas A. Olson presiding. Defendant did not testify at the trial. The jury was apparently unable to reach a verdict, and a mistrial was declared.

4. Subsequently, on December 23, 1985, Defendant plead [sic] guilty to the charged offense, pursuant to a plea agreement wherein he would have received a sentence of up to 100 years, with no restriction on parole eligibility. On January 24, 1986, Judge Olson rejected the plea, ordered it withdrawn, and reinstated Defendant in a not guilty status.

5. Prior to his second trial, following certain pretrial rulings by the trial Court, both the State and Defendant filed requests for interlocutory review with the Montana Supreme Court [Cause Number 86-279]. Following the filing of six plenary briefs by the parties, the Supreme Court on November 13, 1986, issued an order dismissing the case for lack of jurisdiction. Defendant's Petition for Rehearing was denied by Opinion and Order dated January 20, 1987.

6. After several judge recusals, the Honorable James B. Wheelis assumed jurisdiction of the case, and the place of trial was changed from Park to Lewis & Clark County. There, on June 8-26, 1987, the Defendant was again tried before a jury. Defendant testified at the second trial. The jury found him guilty of deliberate homicide, and he was sentenced as set out above.

7. Defendant appealed the conviction to the Montana Supreme Court [Cause No. 88-38]. On May 3, 1990, the Montana Supreme Court issued an Opinion affirming the conviction, *State v. VanDyken*, 791 P.2d 1350 (Mont. 1990). On May 9, 1990, the Defendant filed a Petition for Rehearing with the Montana Supreme Court, which was denied May 25, 1990.

8. On August 22, 1990, Defendant filed a Petition for Certiorari with the United States Supreme Court. [Cause No. 90-347]. Certiorari was denied October 15, 1990, *VanDyken v. Montana*, 111 S.Ct. 297 (1900) [sic].

9. On April 11, 1991, the Defendant applied for review of his sentence before the Sentence Review Division of the Montana Supreme Court. The application was

heard November 8, 1991. On January 6, 1992, the Sentence Review Division, by a 2-1 decision, denied Defendant's request to have the parole ineligibility portion of his sentence modified.

10. Other than the proceedings above-described, Defendant has undertaken no legal actions with respect to this Judgment in any Court. No proceedings are presently pending.

11. For the convenience of the Court in understanding the issues presented in this Petition and for purposes of assisting its determination that the exhaustion requirement of 28 U.S.C. Section 2254(b) has been met, the following documents are appended to this Petition:

(1) Opening Brief of Defendant, *State ex rel VanDyken v. District Court*, Montana Supreme Court Cause Number 86-279 [hereinafter identified as Exhibit A].

(2) Brief of Appellant, *State v VanDyken*, Montana Supreme Court Cause Number 88-38 [hereinafter identified as Exhibit B].

(3) Petition for Certiorari, *VanDyken v Montana*, United States Supreme Court Cause Number 90-347 [hereinafter identified as Exhibit C].

12. Pursuant to the Section 2254 Rules (as amended February 1, 1993), the Petitioner sets out *concisely* the grounds of this application for relief from unconstitutional confinement:

I. Twice placed in jeopardy, in contravention of US Constitution, Amendments V and XIV, in that:

A. At Petitioner's first trial, the Court declared a mistrial without manifest necessity [see Exhibit A, 4-7, 12-22; Exhibit B, 20-31].

B. The State was able to alter the legal positions of the parties so fundamentally and drastically between the first and second trials, solely as a result of the full exposure of the defense case in the first trial, that a core violation of the basic policies underlying the double jeopardy ban occurred, resulting in double jeopardy of Petitioner [see Exhibit B, 31-39; Exhibit C, 4-20].

II. Convicted without due process of law, in that:

At his second trial, the Court refused Defendant's "failure-to-agree" transition instruction, and instead, instructed the jury using the State's "acquittal-first" transition instruction, regarding the proper method and order of deliberation with respect to the different grades of homicide under consideration [see Exhibit B, 54-58; Exhibit C, 21-27].

III. Convicted without due process of law, in that:

At his second trial, the Court refused Defendant's offered instructions defining the crime of deliberate homicide, and instead instructed the jury with a modified version of the *Sigler* instructions offered by the State, thereby converting the offense of deliberate homicide into a strict-liability offense. It violates the due process clause to impose capital or other serious liability for a strict-liability offense [see Exhibit B, 58-70].

IV. Convicted in contravention of his right against compulsory self-incrimination, US Constitution, Amendment V, in that:

Before his second trial, the Court granted the State's motion in limine precluding his expert psychiatric witness from testifying as to Defendant's recollection of any of the crucial events and circumstances surrounding the crime, thus erroneously compelling Defendant to take the witness stand on his own behalf [Exhibit A, 22-46; Exhibit B, 39-54].

13. Petitioner is incarcerated by virtue of no other convictions or judgments.

14. Petitioner has been represented by present counsel since his arrest herein, December 7, 1984.

WHEREFORE, the Petitioner prays that the Court grant Petitioner the relief to which he may be entitled in this proceeding.

RESPECTFULLY SUBMITTED this 10th day of January, 1994.

WILLIAM BOGGS
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ATTORNEYS FOR PETITIONER

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January *7th*, 1994.

/s/ *Fred Daniel Van Dyken*
Petitioner

INSTRUCTION G

You are instructed that the offenses of deliberate homicide and mitigated deliberate homicide relate to conduct which is done deliberately: that is "knowingly" or "purposely." On the whole, it is a person who means to do the thing that constitutes the crime, knowing he is doing it, and knowing that there is a substantial and unjustifiable risk in doing it, whose mental state falls within these definitions.

For deliberate homicide and mitigated homicide, the State must prove beyond a reasonable doubt that the defendant not only did an act which caused the (result of) death, but that he did it with the knowledge that he was causing or with the purpose to cause the death.

More specifically, the mental state "purposely" is the more serious or wrongful mental state and implies an objective or design. It is where a person's conscious object is to cause a particular result.

"Knowingly" refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Where a person is aware that it is highly probable that a certain result will be caused by his conduct, he acts knowingly with respect to the result of that conduct.